

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIL JABBAR MCFARLAND,

Defendant-Appellant.

UNPUBLISHED

February 2, 2006

No. 256841

Oakland Circuit Court

LC No. 2004-194760-FH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant Jamil McFarland appeals as of right from jury convictions of felon in possession of a firearm (felony-firearm),¹ possession of a firearm during the commission of a felony,² and carrying a concealed weapon in a motor vehicle.³ The trial court sentenced McFarland as a fourth habitual offender⁴ to concurrent terms of 2 to 15 years for felon in possession of a firearm and CCW, and to a consecutive two-year term for felony-firearm. We affirm. We decide this appeal without oral argument.⁵

I. Basic Facts And Procedural History

Officers Brian Carten and Steve Arbenowske were on routine patrol shortly before 3:00 a.m. on January 31, 2004. While driving westbound on Eight Mile, Officer Carten observed a car that appeared to have an expired license plate. The in-car computer confirmed that the license plate was in fact expired. Therefore, Officer Carten initiated a traffic stop.

The car stopped in the parking lot of the Embassy Motel. Officer Carten approached the driver while Officer Arbenowske spoke to the passenger, whom the officers later identified as

¹ MCL 750.224f(2).

² MCL 750.227b(1).

³ MCL 750.227(2).

⁴ MCL 769.12.

⁵ MCR 7.214(E).

McFarland. The driver, Ebony Riler, was unable to provide a license, registration, or proof of insurance, so Officer Carten took her name. McFarland told Officer Arbenowske that his name was Ivory Benson. The officers returned to the patrol car and ran the names through the in-car computer. The computer indicated that Riler's license was suspended and that she had an outstanding warrant. The computer did not return any entries for Ivory Benson. The car was not registered to either occupant.

The officers returned to the stopped vehicle, and Officer Carten took Riler into custody for driving on a suspended license. Once Riler was secured in the back of the patrol car, the officers turned their attention to McFarland. The officers asked McFarland to exit the vehicle, and Officer Arbenowske requested permission to pat him down "to make sure he had no weapons on him." The officers testified that McFarland agreed to the search. Officer Carten then took McFarland to the front of his patrol car and stayed with him while Officer Arbenowske searched the vehicle.

Officer Arbenowske found a loaded semiautomatic handgun under the front passenger seat. He removed it from under the seat and set it on the passenger seat. McFarland then spontaneously announced, "He found a gun." Leaving the gun in the car, Officer Arbenowske approached McFarland and asked him if he knew anything about the gun. McFarland said he did not. Officer Arbenowske placed him under arrest. McFarland then gave the officers his real name.

Officer Carten and Officer Arbenowske testified that while they were placing Riler under arrest, a man came down the stairs of the motel and started to approach them. They told him to stay back until they were finished. Riler indicated that the man was her father and that he owned the car. By the time the officers finished their investigation, the man had disappeared. Two other officers tried to locate the man, but they were unsuccessful.

Edith McFarland, McFarland's mother, and her friend, Louis Jefferson, testified that during the day on January 30, 2004, Edith called Jefferson to report that vandals had damaged her car, and she asked whether he had "any kind of protection for her." Jefferson later arrived at Edith's apartment with a gun wrapped in a plastic grocery bag. But by that time Edith had already obtained a rifle from someone else. So Jefferson took his gun back to his car. He opened the passenger door and was about to remove the magazine and put it in the glove box when Kate, a young woman he knew, greeted him. He explained that he was startled, so he "just threw the gun up under the passenger side seat."

Jefferson and Kate then went into Edith's apartment for drinks. Edith testified that McFarland "was in and out" of her apartment while Jefferson was there. Jefferson and Kate then left to go to the motel. Edith testified that McFarland went with them. Jefferson stated that he asked McFarland to go with them "so he could drive the car back, so he could fix his mother's tire." Once at the motel, Jefferson got a room. McFarland left in the car, but he was supposed to come back after a couple hours to pick up Jefferson. Jefferson explained that he forgot the gun was still in the car and neglected to mention it to McFarland.

Edith testified that McFarland returned to her apartment with his girlfriend, Ebony Riler. McFarland replaced Edith's flat tire. Edith claimed that Jefferson called, and McFarland and Riler went to pick him up. Jefferson testified that he happened to leave the motel room and

spotted his car, McFarland, and the police in the parking lot. He started to approach but the officers instructed him not to come any further. They told him to go back to the room and that they would talk to him shortly. Jefferson returned to his room as directed, but the police did not come and talk to him. Jefferson said he felt guilty about McFarland being arrested, but he did not go to the police and tell them the gun belonged to him.

Jefferson denied that Ebony Riler was his daughter. He only knew Riler as McFarland's girlfriend. Jefferson denied telling a detective that McFarland saw the gun at Edith's apartment. In fact, Jefferson claimed that McFarland was not even there until after Jefferson had returned the gun to the car.

McFarland testified that he did not know about the gun in Jefferson's car and did not tell anyone about the gun being in the car. McFarland confirmed that he saw Jefferson at his mother's house. McFarland stated that he and Riler went to pick up Jefferson at the motel. McFarland admitted declaring that Officer Arbenowske had found a gun at the scene. McFarland explained that he could tell from Officer Arbenowske's movements that "he found a weapon or somethin'"

II. Sufficiency Of The Evidence

A. Standard Of Review

McFarland contends that the prosecutor presented insufficient evidence to prove that he possessed or carried a weapon. In reviewing the sufficiency of the evidence in a criminal case, we must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.⁶ Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime.⁷ The trier of fact determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences.⁸

B. Establishing The Elements

Felon in possession of a firearm and felony-firearm both require proof that the defendant possessed a firearm.⁹ Possession of a weapon may be actual or constructive, and may be proved by circumstantial evidence.¹⁰ "[A] defendant has constructive possession of a firearm if the

⁶ *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

⁷ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

⁸ *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

⁹ MCL 750.224f(2); MCL 750.227b(1).

¹⁰ *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989).

location of the weapon is known and it is reasonably accessible to the defendant.”¹¹ Carrying a concealed weapon requires proof that the defendant was “carrying” a weapon.¹² “Carrying” is similar to possession and denotes intentional control or dominion over the weapon.¹³

The parties stipulated that McFarland had been previously convicted of a felony and, as of the date of this incident, his right to possess a firearm had not been restored. Further, the prosecutor established that McFarland was the front-seat passenger of a car, and that a loaded firearm was found beneath the front passenger seat. Mere presence is insufficient to prove constructive possession,¹⁴ but, here, *before* Officer Arbenowske revealed his discovery or displayed the weapon, McFarland spontaneously announced that the officer had found a gun. A fact of the crime known only to the defendant is evidence of guilt.¹⁵ We conclude that the evidence, when viewed in a light most favorable to the prosecution, was sufficient to prove beyond a reasonable doubt that McFarland possessed a weapon.

III. Jury Instructions

McFarland contends that the trial court erred in failing to instruct the jury on the use and effect of a witness’ prior inconsistent statement. McFarland failed to preserve this issue by requesting the instruction or objecting to its absence.¹⁶ Moreover, defense counsel expressed satisfaction with the instructions as given. “By expressly approving the instructions, defendant has waived the issue on appeal.”¹⁷

IV. Effective Assistance Of Counsel

McFarland also mentions that defense counsel may have been ineffective for failing to object to the instructions given. Because McFarland did not include this issue in his statement of questions presented, it has not been properly presented and is waived.¹⁸ McFarland “has presented nothing for review.”¹⁹ That aside, McFarland admits that the error “may not rise to the

¹¹ *Id.* at 470-471.

¹² MCL 750.227(2).

¹³ *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).

¹⁴ *People v Wolfe*, 440 Mich 508, 520, 527; 489 NW2d 748, amended 441 Mich 1201 (1992).

¹⁵ *People v Cutchall*, 200 Mich App 396, 402-404; 504 NW2d 666 (1993).

¹⁶ *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

¹⁷ *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

¹⁸ *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

¹⁹ *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

level of ineffective assistance of counsel” as defined by case law.²⁰ Therefore, even if the issue had been properly presented, McFarland has failed to establish error entitling him to relief.

We affirm.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

²⁰ See *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).